

Whistleblower Newsletter

February 15, 2006

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AIR21

PROCEDURE

SCOPE OF REVIEW; FAILURE OF RESPONDENT TO FILE EXCEPTIONS TO ALJ'S ATTORNEY FEE AWARD

Under the AIR21 regulations, failure of the Respondent to file exceptions to the ALJ's attorney fee award renders the award final and unreviewable by the ARB or Court of Appeals. ***Vieques Air Link, Inc. v. USDOL***, No. 05-01278 (1st Cir. Feb. 2, 2006)

(per curiam) (available at 2006 WL 247886) (case below ARB No. 04-021, ALJ No. 2003-AIR-10).

PROCEDURE BEFORE THE ARB

JURISDICTION OF THE ARB; NOTICE OF COMPLAINANT OF INTENT TO FILE A SOX COMPLAINT IN FEDERAL COURT; ARB RETAINS JURISDICTION TO DISPOSE OF AIR21 COMPLAINT

In *Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-022, ALJ No. 2004-AIR-32 (ARB Jan. 31, 2006), the Complainant indicated an intent to file a consolidated complaint under the SOX regulations in district court. The ARB observed that the AIR21 does not include a SOX-type election to file in district court and that OSHA and the ALJ had treated the complaint as only stating a claim under AIR21. The ARB found that regardless of whether the district court assumed jurisdiction over any SOX claims that the Complainant may have raised, the district court would not have jurisdiction over the AIR21 claim, and therefore the ARB retained jurisdiction to dispose of the AIR21 complaint.

ARB TECHNICAL BRIEFING REQUIREMENTS; SIZE OF FONT IN FOOTNOTES

In *Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-022, ALJ No. 2004-AIR-32 (ARB Jan. 31, 2006), the Complainant moved to strike the Respondent's brief because it included footnotes that were not in 12-point size. Although not ruling on this motion because it found that the outcome of the case would have been no different if the brief had been struck, the Board stated that it "would not countenance any attempt to subvert the Board's page limit for briefs through the use of an inordinate number of undersized footnotes." Slip op. at n.58.

TIMELINESS OF COMPLAINT

TIMELINESS OF COMPLAINT; EQUITABLE MODIFICATION - PRECISE CLAIM IN WRONG FORUM; PASSING REFERENCE TO FRAUD, WASTE AND ABUSE REGULATION IN A COMPLAINT FILED WITH THE DEPARTMENT OF DEFENSE FOUND NOT TO BE AN AIR21 COMPLAINT AS A MATTER OF LAW

In *Ferguson v. Boeing Co.*, ARB No. 04-084, ALJ No. 2004-AIR-5 (ARB Dec. 29, 2005), the issue before the ARB was whether the Complainant had established that there were any material facts relevant to the issue whether he mistakenly filed the precise statutory claim in the wrong forum when he filed a "Fraud, Waste, and Abuse Complaint" with the Department of Defense pursuant to 10 U.S.C.A § 2409 alleging, among other things, that a Boeing manager's fraud could put airmen's lives and others in jeopardy. The Board concluded that the Complainant's passing reference to putting lives in jeopardy is not sufficient, as a matter of law, to establish that the complaint filed with the Department of Defense constituted the precise statutory claim (i.e. an AIR 21 claim) filed in the wrong forum.

BURDEN OF PROOF AND PRODUCTION

BURDEN TO SHOW THAT ALJ'S CREDIBILITY DETERMINATIONS WERE INCREDIBLE OR UNREASONABLE

Where an ALJ credits the testimony of the respondent's witnesses, a complainant who maintains on ARB review that those witnesses were not truthful has the burden of demonstrating that the ALJ's credibility determinations were incredible or unreasonable. **Gary v. Chautauqua Airlines**, ARB No. 04-112, 2003-AIR-38 (ARB Jan. 31, 2006) (citing *Lockert v. U.S. Dept. of Labor*, 867 F.2d 513, 519 (9th Cir. 1989)).

BURDENS OF PROOF IN AIR21 WHISTLEBLOWER COMPLAINT; GENERAL OUTLINE

In **Brune v. Horizon Air Industries, Inc.**, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006), the ARB restated the procedures and burdens of proof applicable to an AIR21 whistleblower complaint, which had earlier been detailed in *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 6-18 (ARB Jan. 30, 2004). The Board distinguished the procedure followed at the OSHA investigatory stage and at the hearing stage before the OALJ and the ARB, with the essential difference being that to secure an investigation, a complainant needs only to raise an inference of unlawful discrimination (i.e., establish a prima facie case), while at the adjudicatory stage a complainant must prove unlawful discrimination. The ARB wrote that:

This is not to say, however, that the ALJ (or the ARB) should not employ, if appropriate, the established and familiar Title VII methodology for analyzing and discussing evidentiary burdens of proof in AIR21 cases. The Title VII burden shifting pretext framework is warranted where the complainant initially makes an inferential case of discrimination by means of circumstantial evidence. The ALJ (and ARB) may then examine the legitimacy of the employer's articulated reasons for the adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action.

Thereafter, and only if the complainant has proven discrimination by a preponderance of evidence and not merely established a prima facie case, does the employer face a burden of proof. That is, the employer may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event.

Brune, *supra*, slip op. at 13-14 (footnotes omitted). In **Brune**, the ALJ erred in that he required the Complainant to prove his case according to the prima facie case standard, rather than the preponderance of the evidence standard. It is not enough at the hearing phase for a complainant merely to establish a rebuttable presumption that the employer discriminated. Rather, a complainant must prove by a preponderance of the evidence protected activity, adverse action and causation.

The ALJ also erred because, once the Complainant established a prima facie case, the ALJ assigned the Respondent the burden of demonstrating by clear and convincing evidence that it would have taken the same adverse personnel action in the absence of his employee's protected activity. Rather, a respondent's burden upon a complainant's establishment of a prima facie case is one of *production*, not proof -- the respondent needs only to articulate some legitimate, non-discriminatory reason for its actions -- the respondent's "clear and convincing evidence" burden of proof only arises if the complainant has proven discrimination by a preponderance of the evidence.

ADVERSE EMPLOYMENT ACTION

AIR21 IS NOT RETROACTIVE TO COVER ADVERSE ACTIONS THAT OCCURRED BEFORE ITS EFFECTIVE DATE

THE CONTINUING VIOLATION THEORY HAS BEEN REJECTED IN ENVIRONMENTAL WHISTLEBLOWER CASES, AND THIS REJECTION ALSO APPLIES TO AIR21 CASES

HOSTILE WORK ENVIRONMENT; ALJ MUST APPLY CRITERIA ENUNCIATED IN SASSE v. U.S. OFFICE OF THE UNITED STATES ATTORNEY, AS CLARIFIED BY BELT v. USDOL

In **Brune v. Horizon Air Industries, Inc.**, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006), the Complainant had alleged a series of adverse actions from 1999-2001 in retaliation for activity protected under AIR21, and timely filed his AIR21 complaint following a May 7, 2001 "write-up" memorandum. The ALJ found that all of the alleged actions were actionable because (1) the May 7, 2001 memorandum incorporated all "previous counseling," (2) there had been a "continuing violation," and (3) there had been a hostile work environment.

The ARB found that the ALJ misapplied the law. First, AIR21 became effective on October 1, 1999. Two of the alleged actions occurred before this date and were therefore outside the reach of AIR21.

Second, although some older decisions recognized the continuing violation theory, the Supreme Court in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 114-115 (2002) rejected that theory in Title VII cases. The ARB had previously held a number of times that *Morgan* applies to the environmental whistleblower statutes, and found no reason that those holdings should not apply to AIR21.

Third, the ALJ did not apply the criteria for applying the hostile work environment theory that the ARB had recently enunciated in *Sasse v. Office of the United States Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 1998-CAA-7, slip op. at 34-35 (ARB Jan. 30, 2004), *aff'd sub nom Sasse v. United States Dept. of Labor*, 409 F.3d 773 (6th Cir. 2005). Specifically -- assuming that the hostile work environment theory applied because the alleged acts were not discrete and were in fact adverse employment actions -- the ALJ had failed to make findings on whether the Respondent intentionally harassed the Complainant, the extent of the harassment, whether the alleged harassment was severe or pervasive enough to change the conditions of the Complainant's employment and create an abusive working environment, or whether the harassment would have had any detrimental effect on a reasonable person and whether it did have such an effect on the Complainant.

In a footnote, the ARB clarified the *Sasse* standard based on the recent ruling in *Belt v. United States Dept. of Labor*, 2006 WL 197385 (6th Cir. Jan. 25, 2006). The ARB had stated in *Sasse* that "[t]o prevail on a hostile work environment claim, the complainant must establish that the conduct complained of was extremely serious or serious and pervasive." The ARB agreed with the Sixth Circuit that "the more precise articulation of the standard is whether the objectionable conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, rather than whether the conduct was 'extremely serious or serious and pervasive.'" 2006 WL 199735 *6."

CONSTRUCTIVE DISCHARGE; REASSIGNMENT RESULTING IN DRASTIC INCREASE IN COMMUTING TIME AND UNREIMBURSED COSTS

In *Vieques Air Link, Inc. v. USDOL*, No. 05-01278 (1st Cir. Feb. 2, 2006) (per curiam) (available at 2006 WL 247886) (case below ARB No. 04-021, ALJ No. 2003-AIR-10), the First Circuit affirmed the ARB decision adopting the ALJ's recommended decision, finding that substantial evidence supported the ALJ's findings. In regard to the adverse employment action element of the cause of action, the court affirmed the ALJ's finding that the Complainant had been constructively discharged. The Respondent, an island air service, reassigned the Complainant - a pilot -- with the result that he would have to begin his flight schedule from an island other than where he lived. The Complainant repeatedly requested assistance from the Respondent in getting to the work station but received no response. The Complainant showed up for work at a local airport with the hope that the airline would assist him in getting to the work station, but was not assisted. The Respondent argued that the Complainant could have secured overnight accommodations near the new assignment, but the ALJ credited the Complainant's testimony that he could not afford the additional costs associated with the overnight accommodations given that he had to maintain his original residence for his young family. The court quoted *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 120 (1st Cir. 1977) (footnote omitted): "Doubtless a drastic increase in commuting time and unreimbursed costs might at some point become sufficiently onerous to justify an employee in quitting." The court found that substantial evidence supported the ALJ's

conclusion that the transfer imposed such conditions on the Complainant and amounted to a constructive discharge.

CAUSATION

CAUSATION; BURDEN TO SHOW THAT PERSON WHO FIRED THE COMPLAINANT KNEW ABOUT THE PROTECTED ACTIVITY

In *Gary v. Chautauqua Airlines*, ARB No. 04-112, 2003-AIR-38 (ARB Jan. 31, 2006), the ARB found that substantial evidence supported the ALJ's finding that the Complainant did not adequately prove that the Respondent's Director of Pilot Training knew about the Complainant's protected activity (filing a prior whistleblower lawsuit against another airline) when he fired the Complainant for inadequate performance in a training program. The Complainant alleged that he had told the Respondent's recruiter about his prior whistleblower suit at an interview (which the recruiter denied), and that the Respondent must have been aware of it because it had contacted the prior airline when conducting a background investigation. The ARB found that even if the recruiter knew about the prior whistleblower suit, the Complainant's burden was to show that the Director of Training knew about it. The Director of Training had testified that he did not know about the prior lawsuit until after the Complainant filed the instant AIR21 suit, and the recruiter testified that she had not told the Director of Training anything about the prior airline's response to the background investigation. The Complainant argued that it was improbable that the Respondent did not know of the prior suit because it was "standard practice" for airline companies to divulge such information. The ARB, however, observed that the Complainant had offered no proof to support these assertions. Moreover, the ALJ had found the recruiter and Director of Training to be credible witnesses, and the Complainant had not demonstrated that the ALJ's credibility determinations were incredible or unreasonable. Finally, the Complainant did not assert until the hearing that he had told the recruiter about the prior lawsuit.

PRETEXT

PRETEXT; SHIFTING EXPLANATIONS CAN THEMSELVES BE EVIDENCE OF PRETEXT

The fact that an employer offers shifting explanations for its challenged personnel action can itself serve to demonstrate pretext. *Vieques Air Link, Inc. v. USDOL*, No. 05-01278 (1st Cir. Feb. 2, 2006) (per curiam) (available at 2006 WL 247886) (case below ARB No. 04-021, ALJ No. 2003-AIR-10) (the employer had not offered lack of seniority as the reason for a disadvantageous transfer until the time the hearing).

CONTRIBUTING FACTOR

CAUSATION; TEMPORAL PROXIMITY MAY BE SUFFICIENT TO ESTABLISH CONTRIBUTING FACTOR ELEMENT

In *Vieques Air Link, Inc. v. USDOL*, No. 05-01278 (1st Cir. Feb. 2, 2006) (per curiam) (available at 2006 WL 247886) (case below ARB No. 04-021, ALJ No. 2003-AIR-10), the First Circuit held that the ALJ permissibly treated the temporal proximity between the Complainant's reports and his suspensions by the Respondent as sufficient to show the requisite causal relationship to establish that his protected activity was a contributing factor in the adverse employment action he suffered.

DAMAGES

COMPENSATORY DAMAGES FOR NONECONOMIC DAMAGE; PAIN AND SUFFERING; SETTING AMOUNT BY COMPARATIVE ANALYSIS

In *Vieques Air Link, Inc. v. USDOL*, No. 05-01278 (1st Cir. Feb. 2, 2006) (per curiam) (available at 2006 WL 247886) (case below ARB No. 04-021, ALJ No. 2003-AIR-10), the First Circuit affirmed a compensatory damages award of \$50,000 for mental anguish as supported by substantial evidence where the Complainant credibly testified that he struggled to support his wife and two infant children while he looked for a new full-time job following his termination by the Respondent. He had been forced to sell both of the family's modest cars and deplete their meager savings to make ends meet. He testified that this ordeal caused him pain and suffering. The court noted that the ALJ had taken into consideration like circumstances found to support similar awards in other cases which had come before the ARB, and that the ARB had agreed with the ALJ's assessment.

DISMISSALS

DISMISSAL FOR CAUSE; COMPLAINANT'S FAILURE TO COMPLY WITH ALJ'S ORDERS DIRECTING RESPONSES TO RESPONDENT'S INTERROGATORIES AND DISCOVERY REQUESTS

In *Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-022, ALJ No. 2004-AIR-32 (ARB Jan. 31, 2006), the ARB affirmed the ALJ's dismissal of the complaint based on the Complainant's failure to file adequate responses to the Respondent's interrogatories or any response to its discovery requests. The ARB found that the ALJ had given the Complainant more than adequate opportunities to comply and that the Complainant had been well aware of the consequences of refusal to comply. The ARB found that the Complainant failed on review to establish any basis for holding that the ALJ had incorrectly concluded that the response to the interrogatories was essentially a non-response. The Board found that 29 C.F.R. § 18.6(2)(v) provided authority for the

ALJ to deny a complaint for failing to comply with an order directing a party to respond to interrogatories or to produce documents, and cited *Supervan, Inc.*, ARB No. 00-008, ALJ No. 1994-SCA-14 (ARB Sept. 30, 2004), for the proposition that the ALJ must have the authority to dismiss cases involving flagrant non-compliance with discovery requests to deter others from disregarding such orders.

MISCONDUCT AND SANCTIONS

SANCTION FOR FRIVOLOUS CLAIM; RESPONDENT'S BURDEN IS TO SHOW COMPLAINT LACKED ARGUABLE BASIS IN EITHER LAW OR FACT

In *Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-022, ALJ No. 2004-AIR-32 (ARB Jan. 31, 2006), the ARB affirmed the ALJ's dismissal of the complaint based on the Complainant's failure to file adequate responses to the Respondent's interrogatories or any response to its discovery requests, despite having several opportunities to comply. The Respondent requested in its appellate brief that the ARB find that the complaint was frivolous and brought in bad faith and order the Complainant to pay an attorney's fee of \$1000 under 29 C.F.R. § 1979.110(e). The Board held that to prevail on such a request the Respondent was required to demonstrate that the complaint lacked an arguable basis in either law or fact. *Allison v. Delta Air Lines, Inc.*, ARB No. 03-150, ALJ No. 2003-AIR-14, slip op. at 6 (ARB Sept. 30, 2004). Because the brief did not address this requirement, the ARB denied the request.

NUCLEAR AND ENVIRONMENTAL

[Nuclear and Environmental Whistleblower Digest XII C 4]

PROTECTED ACTIVITY UNDER THE CAA; COMMUNICATION TO RESPONDENT OF REASONABLE BELIEF OF RELEASE INTO AMBIENT AIR NOT REQUIRED TO ESTABLISH PROTECTED ACTIVITY, ALTHOUGH IT MAY BE RELEVANT TO ISSUE OF CAUSAL RELATIONSHIP BETWEEN PROTECTED ACTIVITY AND ADVERSE ACTION

[Nuclear and Environmental Whistleblower Digest II B 2]

PROTECTED ACTIVITY UNDER THE CAA; FOURTH CIRCUIT SUGGESTS THAT RELEASE INTO AMBIENT AIR IS NOT NECESSARILY REQUIRED FOR CAA COVERAGE

In *Knox v. USDOL*, No. 04-2486 (4th Cir. Jan. 17, 2006) (case below ARB No. 03-040, ALJ No. 2001-CAA-3), the Fourth Circuit reversed the ARB's finding that, because the CAA is concerned with the pollution of "ambient air," *i.e.*, air external to buildings, and the Complainant only complained of asbestos within his workplace, he did not engage in protected activity under the CAA. The ARB had announced that for the Complainant to establish that he engaged in CAA protected activity he must

prove that when he expressed his concerns about the asbestos he reasonably believed that the Respondent was emitting asbestos into the ambient air. In its decision, the ARB pointed to evidence that the Complainant's complaints to management were only about asbestos in the workplace generally, as opposed to the potential for asbestos being emitted into the ambient air, and the Complainant's testimony that he observed asbestos escaping through exhaust fans did not establish that he ever told the Respondent's officials about the exhaust fan.

The Fourth Circuit found that

the ARB altered its protected activity standard from an inquiry into Knox's reasonable beliefs to a *requirement* that Knox *actually conveyed* his reasonable beliefs to management. Although the contents of Knox's complaints may provide evidence of his reasonable beliefs, it does not follow that he must have necessarily conveyed a notion to have reasonably believed it, as the ARB demanded of him. Indeed, in the very first sentence of this paragraph, the ARB seemed to accept as true, evidence that Knox did, in fact, reasonably believe that asbestos was emitted into the ambient air. Given the standard that the ARB initially announced, requiring Knox to have reasonably believed that asbestos was being emitted into the ambient air, and the ARB's acceptance that Knox observed asbestos escaping into the ambient air, we conclude that Knox has engaged in a protected activity under the CAA as interpreted by the ARB.

Slip op. at 6 (footnote omitted). The court therefore remanded for further proceedings. The court noted that it was only holding that the ARB's standard for determining whether the Complainant engaged in protected activity did not require the Complainant to convey his reasonable beliefs to management, and that the Respondent's awareness of his complaints may be relevant in regard to causal connection between protected activity and the adverse action.

The court also noted that it was

not convinced that a reasonable belief of a release into the ambient air is even the correct standard in all cases under the whistleblower provision of the CAA. There are several ways to violate the CAA and its implementing regulations without releases into the ambient air. See, e.g., 42 U.S.C. § 7412(h)(1) (allowing EPA to establish work practice standards for pollutants such as asbestos); 40 C.F.R. § 61.150 (setting forth standards for "waste disposal for manufacturing, fabricating, demolition, renovation, and spraying operations" involving asbestos, some of which can be violated without releases of asbestos into the ambient air); *United States v. Ho*, 311 F.3d 589, 594-95 (5th Cir. 2002) (discussing work practice standards involving asbestos). Thus, depending on the circumstances, an employee could reasonably

believe his employer was violating the CAA, even if no release into the ambient air occurred.

[Nuclear and Environmental Whistleblower Digest III B 2 b]

TIMELINESS OF COMPLAINT; NOTICE OF TERMINATION, EVEN IF INDEFINITE, SUFFICIENT TO COMMENCE RUNNING OF LIMITATIONS PERIOD

In *Belt v. USDOL*, Nos. 04-3487, 04-3926 (6th Cir. Jan. 25, 2006) (unpublished) (case below ARB No. 02-117, ALJ No. 2001-ERA-19), the Sixth Circuit affirmed the ARB's determination that the Complainant's ERA complaint was not timely filed based on the date that the Complainant signed an irrevocable memorandum acknowledging his decision to be selected for an involuntary reduction in force. The fact that the effective date of his termination was almost a month later was not relevant. The court held that even if the notice of termination had been indefinite (which the court concluded it was not), under *Kessler v. Bd. of Regents*, 738 F.3d 751, 755-56 (6th Cir. 1984), the notice would have been sufficient to commence the running of the limitations period.

[Nuclear and Environmental Whistleblower Digest IV B 3]

EQUITABLE TOLLING; PRECISE CLAIM IN WRONG FORUM; LENGTH OF TIME TO FILE IN CORRECT FORUM AFTER DISMISSAL IN WRONG FORUM

In *Immanuel v. The Railway Market*, ARB No. 04-062. 2002-CAA-20 (ARB Dec. 30, 2005), it was assumed, for purposes of disposing of the case, that the Complainant's state agency filing raised the precise statutory claim in issue, but was mistakenly filed in the wrong forum – therefore tolling the 30-day limitations period of the environmental whistleblower acts. The issue decided on appeal was how much time a complainant has to file in the correct forum once a complaint that has been filed in the wrong forum is dismissed. Citing *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424 (1965) and *Crown Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983), the Board held that the Complainant had no more than 30 days within which to file his environmental whistleblower complaint with OSHA after the state agency dismissed his claim. Since the Complainant did not do so for 73 days, the OSHA complaint was untimely.

[Nuclear and Environmental Whistleblower Digest XI A 2 a]

CAUSATION; DECISION TO DENY DISABILITY RETIREMENT MADE BY LEGALLY DISTINCT RETIREMENT SYSTEM RATHER THAN RESPONDENT

[Nuclear and Environmental Whistleblower Digest XIII B 2]

ADVERSE ACTION; DECISION TO DENY DISABILITY RETIREMENT

In *Durham v. Tennessee Valley Authority*, 2006-CAA-3 (ALJ Feb. 13, 2006), the Complainant alleged that he was denied disability by the Tennessee Valley Authority in retaliation for his prior whistleblowing complaints and other complaints to state and federal agencies. The ALJ recommended dismissal on summary decision in favor

of the Respondent where the uncontested evidence was that the decision to deny the Complainant's disability retirement application was made by the TVA Retirement System (TVARS), which is a legal entity separate and distinct from TVA, the TVARS was not the Complainant's employer, and the TVARS decision makers had no knowledge of the Complainant's protected activity.

[Nuclear and Environmental Whistleblower Digest VIII B 2 d]

ARB'S STANDARD OF REVIEW; ALJ'S RECOMMENDED GRANT OF JUDGMENT AS A MATTER OF LAW

The ARB applies a de novo standard of review of an ALJ's recommended grant of judgment as a matter of law. *Immanuel v. The Railway Market*, ARB No. 04-062. 2002-CAA-20 (ARB Dec. 30, 2005).

[Nuclear and Environmental Whistleblower Digest III C 4]

[Nuclear and Environmental Whistleblower Digest XIII C]

HOSTILE WORK ENVIRONMENT; STANDARD IS "SUFFICIENTLY SEVERE OR PERVASIVE" RATHER THAN "EXTREMELY SERIOUS OR SERIOUS AND PERVASIVE"

In *Belt v. USDOL*, Nos. 04-3487, 04-3926 (6th Cir. Jan. 25, 2006) (unpublished) (case below ARB No. 02-117, ALJ No. 2001-ERA-19), the Sixth Circuit indicated that the ARB misstated, in a potentially material way, the legal standard for assessing the applicability of the hostile work environment exception to the running of the ERA statute of limitations, when it stated: "To prevail on a hostile work environment claim, the complainant must establish that the objectionable conduct was *extremely serious or serious and pervasive*." Slip op. at 11, quoting ARB slip op. at 8 (emphasis as added the court). The court, however, found that later in the opinion the ARB correctly stated the standard as only requiring that the Complainant demonstrate that the alleged discrimination was "*sufficiently severe or pervasive*" to alter the conditions of employment and create an abusive working environment." *Id.* (emphasis as added by the court). The court held that, on balance, it was clear that the ARB applied the correct standard despite its initial misstatement.

[Editor's note: The ARB accepted this distinction in *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006).]

[Nuclear and Environmental Whistleblower Digest XIII C]

HOSTILE WORK ENVIRONMENT; EVIDENCE OF A "CHILLED ENVIRONMENT" IS NOT, BY ITSELF, SUFFICIENT PROOF

In *Belt v. USDOL*, Nos. 04-3487, 04-3926 (6th Cir. Jan. 25, 2006) (unpublished) (case below ARB No. 02-117, ALJ No. 2001-ERA-19), the Complainant argued that the ARB erred in holding that the hostile work environment exception to the ERA statute of limitations was not applicable "where the NRC had substantiated a 'chilled environment' for the reporting of safety violations at the facility at which he worked." The court stated that assuming that a chilled environment in fact had existed by the

Respondent's facility, the existence of such is not, by itself, enough to establish that the Complainant was exposed to a hostile work environment.

[Nuclear and Environmental Whistleblower Digest XIV B 2]

EMPLOYER-EMPLOYEE RELATIONSHIP; INDIVIDUAL LIABILITY OF MANAGER

[Nuclear and Environmental Whistleblower Digest XX E]

STATE SOVEREIGN IMMUNITY; INDIVIDUAL LIABILITY OF MANAGER

In *Slavin v. Aigner*, 2005-CAA-11 (ALJ Jan. 19, 2006), the Complainant applied for a management faculty position with the University of California at Santa Barbara Bren School of Environmental Science and Management, and alleged that he was not selected for the position because of protected activity. The University had earlier been dismissed as a Respondent based on state sovereign immunity, and the instant decision related to the liability of individual who was the Dean of the School at the time that the Complainant applied for the job. Reviewing the applicable legal authority under the environmental whistleblower statutes, the ALJ concluded that "a complainant must seek relief from an employer." Although the Dean may have been the senior leader and manager for the school and ultimately responsible for the decision not to hire the Complainant, the employer in this case would have been the University and not the Dean. Accordingly, the ALJ dismissed the complaint.

To the same effect Slavin v. Donald Bren School of Environmental Science and Management at the University of California, Santa Barbara, 2006-CAA-2 (ALJ Jan. 23, 2006) (similar complaint involving a different faculty position and a subsequent Dean).

[Nuclear and Environmental Whistleblower Digest XX E]

STATE SOVEREIGN IMMUNITY

In *Thompson v. University of Georgia*, ARB No. 05-031, ALJ No. 2005-CAA-1 (ARB Jan. 31, 2006), the Complainant alleged that the University of Georgia retaliated against him for complaining about the University's Poultry Science Research Center's improper practice of dipping poultry in pesticide to remove mites. The ARB found, however, that the Board of Regents of the University System of Georgia enjoys sovereign immunity under the 11th Amendment from a CAA, CERCLA, FWPCA, SDWA, SWDA and TSCA whistleblower suit. The ARB declined to retreat from its earlier decisions finding that the CERCLA, TSCA, FWPCA, SDWA, SWDA and CAA do not contain the unmistakably clear language necessary for abrogation. Moreover, it declined to find that the State of Georgia had waived sovereign immunity by receiving federal funds because the Complainant had provided no evidence there was clear waiver language in the particular programs under which the University receives federal funds.

SARBANES-OXLEY

REMOVAL TO FEDERAL DISTRICT COURT

FILING OF COMPLAINT WITH DISTRICT COURT BY QUALIFYING SOX COMPLAINANT DEPRIVES ALJ OF JURISDICTION

Once a qualifying complainant files his complaint with a federal district court under section 1514A(b)(1)(B) of the SOX, jurisdiction vests in the district court and an ALJ no longer has jurisdiction. ***Stone v. Duke Energy Corp.***, 432 F.3d 320 (4th Cir. 2005) (case below 2003-SOX-12). In ***Stone***, once the complainant filed his district court action the ALJ's order closing the matter before OALJ correctly stated simply that the administrative complaint was no longer before him.

REQUEST FOR HEARING

FINALITY OF OSHA DETERMINATION; WHERE COMPLAINANT APPEALED TO OALJ, OSHA DETERMINATION NEVER BECAME FINAL, AND RESPONDENT WAS NOT REQUIRED TO APPEAL COLLATERAL ADVERSE DETERMINATIONS

In ***Goodman v. Decisive Analytics Corp.***, 2006-SOX-11 (ALJ Jan. 10, 2006), the ALJ found that the Complainant's timely appeal of the Regional OSHA Administrator's determinations provided a timely objection such that none of the Regional Administrator's findings became final [since the Respondents were the prevailing parties before OSHA, an order of reinstatement was not at issue]. Since the Complainant's timely objection to the OSHA determination transferred the complaint to OALJ for a de novo determination on the merits, the Respondents were not bound by OSHA's prior determinations. The ALJ also found "as the prevailing party before the Regional Administrator on the ultimate issue of discrimination, the Respondents were not obligated to appeal collateral adverse determinations."

FILING OF SOX COMPLAINT OR REQUEST FOR HEARING WITH OALJ DOES NOT REQUIRE AN ANSWER FROM THE RESPONDENT

In ***Brady v. Direct Mail Management***, 2006-SOX-16 (ALJ Jan. 5, 2006), the Complainant asserted that the Respondent waived the right to contest any of her allegations because it did not respond to her initial complaint, citing 29 C.F.R. § 18.5 in support. The ALJ found the reference to section 18.5, which is part of the general Rules of Practice and Procedure before OALJ, to be misplaced. Under the general rule of practice, whenever those rules are inconsistent with any rule of special application, the latter controls, § 18.1(a), and there is no requirement under the rules governing SOX discrimination complaints, 29 C.F.R. part 1980, that a respondent file an answer or otherwise respond to either an initial complaint filed with OSHA or to a request for a hearing filed with OALJ.

TIMELINESS OF COMPLAINT

TIMELINESS OF COMPLAINT; EQUITABLE ESTOPPEL AND EQUITABLE TOLLING

In ***Guy v. SBC Global Services***, 2005-SOX-113 (ALJ Dec. 14, 2005), the complaint was untimely, and the Complainant sought to invoke equitable estoppel and equitable tolling to enable her to proceed.

The Complainant supported her equitable estoppel argument on the grounds that a promise had been made to her that she would not be retaliated against as a result of her cooperation with an internal investigation, the fact that she had a positive experience with the Respondent in regard to an earlier unrelated discrimination matter making her expect similar treatment with regard to her current complaint, and an alleged statement by the Respondent's attorney during a settlement negotiation that "HR is the proper place to start" The ALJ found that equitable estoppel did not apply because "there is simply nothing in Respondent's actions or statements that provide any reasonable basis upon which Complainant could have relied for not filing" a timely complaint.

In regard to equitable tolling, the ALJ found no evidence that the Respondent misled the Complainant regarding her cause of action, that there were any extraordinary circumstances that may have prevented her from timely asserting her rights under the Act, and that her merely speaking to an EEOC investigator within the 90 day limitations period without filing any kind of formal complaint could not constitute filing in the wrong forum.

TIMELINESS OF COMPLAINT; EQUITABLE TOLLING; IGNORANCE OF THE LAW

A party seeking to invoke equitable tolling for the filing of a SOX whistleblower complaint based on the professed ignorance of the applicability of the SOX to his or her situation must show that his or her ignorance of the limitations period was caused by circumstances beyond the party's control such as mental incapacity. See ***Guy v. SBC Global Services***, 2005-SOX-113 (ALJ Dec. 14, 2005).

TIMELINESS OF COMPLAINT; SWORN AFFIDAVIT INSUFFICIENT, STANDING ALONE, TO ESTABLISH TIMELY FILING

In ***Barker v. Perma-Fix of Dayton, Inc.***, 2006-SOX-1 (ALJ Jan. 11, 2006), the ALJ found that the complaint was untimely under the SOX whistleblower statute of limitations where the Complainant's only proof of date of mailing was her own affidavit. The only verifiable evidence of date of mailing was a postmark on an envelope received by OSHA, which was nine days beyond the limitations period. The ALJ noted that the SOX regulations expressly state that "the date of the postmark ... will be considered to be the date of filing." 29 C.F.R. § 1980.103(d). The

Complainant argued that she should not be held accountable for the alleged mishandling of her letter by the regional OSHA office or the U.S. Postal Service. The ALJ rejected this argument, finding that it was her responsibility to make a timely submission, or provide proof that she attempted to make such a timely submission. The ALJ found that the affidavit was not sufficient proof of timely filing.

TIMELINESS OF COMPLAINT; EQUITABLE TOLLING; FAILURE TO SECURE COUNSEL

Failure to secure counsel in order to pursue a claim under the SOX whistleblower provision is an insufficient reason, in and of itself, to justify equitable tolling of the limitations period for filing a complaint. *Barker v. Perma-Fix of Dayton, Inc.*, 2006-SOX-1 (ALJ Jan. 11, 2006).

TIMELINESS OF COMPLAINT; EQUITABLE MODIFICATION OF LIMITATIONS PERIOD; SILENCE OF RESPONDENT FOUND NOT TO HAVE ACTIVELY MISLED COMPLAINANT; IGNORANCE OF ATTORNEY AND COMPLAINANT ABOUT EXISTENCE OF SOX NOT GROUNDS FOR EQUITABLE MODIFICATION

In *Moldauer v. Canadaigua Wine Co.*, ARB No. 04-022, ALJ No. 2003-SOX-26 (ARB Dec. 30, 2005), the ARB granted summary judgment to the Respondent on the ground that the SOX complaint was not timely filed. The Complainant had been terminated by the Respondent. A severance agreement included the Complainant's release of any discrimination claims he might have against the Respondent under state and federal law. The Complainant's subsequent complaint filed with OSHA was untimely as a SOX complaint. The Complainant asserted that equitable modification of the limitations period should be applied because the Respondent actively misled him when it remained silent about its position that the release excluded SOX claims. The ARB, however, found that the Respondent's mere silence about SOX did not mislead the Complainant, especially since he was represented by counsel when he entered into the severance agreement.

The Complainant next claimed that his counsel's knowledge or lack of knowledge of SOX raised a genuine issue of material fact; the ARB, however, held that clients ultimately bear the consequences of the acts or omissions of a freely chosen attorney. Similarly, the ARB was not persuaded that the Complainant's own lack of awareness of SOX presented grounds for equitable modification of the limitations period.

PROCEDURE BEFORE ARB

STANDARD OF REVIEW; DEFERENCE TO ALJ'S FACTUAL FINDINGS

The ARB will defer to an ALJ's factual findings, especially where they are predicated on the ALJ's weighing and determining the credibility of conflicting witness

testimony. ***Halloum v. Intel Corp.***, ARB No. 04-068, 2003-SOX-7 (ARB Jan. 31, 2006).

REOPENING RECORD; SUBMITTER MUST ESTABLISH THAT NEWLY PROFFERED EVIDENCE IS RELEVANT AND MATERIAL AND WAS NOT AVAILABLE PRIOR TO CLOSING OF THE RECORD BEFORE THE ALJ

In ***Halloum v. Intel Corp.***, ARB No. 04-068, 2003-SOX-7 (ARB Jan. 31, 2006), the Complainant submitted to the ARB an affidavit that had not been in evidence before the ALJ. The ARB noted that its review was limited to the record made before the ALJ and the ALJ's recommended decision and order, but that it could order the ALJ to open the record where proffered evidence is relevant and material and was not available prior to the closing of the record. The ARB declined to do so in the instant case because the Complainant had failed to establish either requirement for reopening a record.

PROCEDURE BEFORE OALJ/GENERALLY

MOTION IN LIMINE; EXPERT TESTIMONY ABOUT SECURITIES LAWS AND OTHER LEGAL MATTERS

In ***Lee v. Pitney Bowes, Inc.***, 2006-SOX-5 (ALJ Jan. 13, 2006), the Respondent filed a Motion in Limine seeking to prevent the Complainant from calling an expert witness to testify regarding "the interpretation of securities laws or other legal matters." The ALJ found that in a SOX whistleblower case, "a fact in issue is whether Complainant reasonably believed he was reporting illegal conduct by Respondent." Consequently, the ALJ granted the Motion in Limine in regard to expert testimony about what law applies in the case and how it applies to the facts; but he denied the Motion in regard to testimony about "industry practices and commonly accepted principles which would tend to show that Complainant's belief that Respondent's conduct was in violation of the law was consistent with those practices and principles and therefore reasonable."

REMAND; OSHA MOTION TO REMAND ON GROUND THAT IT ERRONEOUSLY DENIED THE COMPLAINT ON JURISDICTIONAL GROUNDS

In ***Penesso v. LLC International, Inc.***, 2005-SOX-16 (ALJ Jan. 5, 2005), the Assistant Secretary for OSHA moved for a remand because OSHA now believed that denial of the complaint based on a lack of jurisdiction was in error and that it should conduct an investigation on the merits. The Respondent agreed with the motion and cited section 1980.111(b) for the proposition that the Assistant Secretary has the right to withdraw a determination prior to the expiration of the 30-day period to object. The ALJ, however, found that the Assistant Secretary does not have a right to withdraw the OSHA determination once an objection has been filed. Moreover, the ALJ found that section 1980.109(a) precluded a remand. Moreover, even if the regulations did not preclude a remand, the ALJ would not grant it in the instant case

given the time constraints in SOX cases, that the proceeding before an ALJ is de novo, and that OSHA has the authority to appear as a party before the ALJ.

COVERED RESPONDENT

EXTRATERRITORIAL COVERAGE OF SOX WHISTLEBLOWER PROVISION

In *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006) (case below 2004-SOX-18), the Complainant was an Argentinean citizen resident in Brazil working for two Brazilian subsidiaries of a U.S. parent company. The Complainant was employed and paid by the subsidiaries rather than the parent U.S. company. It was undisputed that the alleged fraudulent conduct reported by the Complainant was instituted in Latin America and that his employment duties were mainly performed outside the U.S.

OSHA and an ALJ dismissed the complaint based on the principle that legislation, unless a contrary intent appears, applies only within the territorial jurisdiction of the U.S. The Complainant then filed in federal district court seeking de novo relief. The district court dismissed on the same grounds as OSHA and the ALJ.

On appeal, the First Circuit first noted that the Complainant's claim would fit generally within the whistleblower protection provision of the SOX if not for the extraterritoriality issue. The court detailed case law regarding the "well-established presumption against the extraterritorial application of Congressional statutes," the provisions and structure of the SOX, the legislative history of the SOX whistleblower provision, and other factors, and held that the SOX whistleblower provision "does not reflect the necessary clear expression of congressional intent to extend its reach beyond our nation's borders." The court therefore held that "the district court properly dismissed Carnero's complaint under 18 U.S.C. §1514A."

The court carefully limited its ruling to the facts of the case, noting that many other fact patterns could be imagined that may or may not be covered by the reasoning in the instant decision.

COVERED EMPLOYER; RESPONDENT WHICH HAD FILED A REGISTRATION WITH THE SEC WHICH HAD NOT YET BECOME EFFECTIVE

In *Stalcup v. Sonoma College*, 2005-SOX-114 (ALJ Feb. 7, 2006), the Respondent had filed a registration statement with the SEC. The Complainant was subsequently terminated. At the time he was terminated, the registration neither had become effective nor had it been withdrawn. The ALJ found that under the plain language of section 806 of the SOX, the Respondent is not a covered employer. Because the Complainant argued that there was evidence of ambiguity or a drafting error, the ALJ nonetheless examined section 806 in the context of the rest of the Act, the legislative intent and the policy of the Act.

The Complainant argued that the Respondent fit the definition of "issuer" found in the definitions portion of the Act, and that this general definition applied to "all or most other sections of the Act, wherever the term 'issuer' is used." Slip op. at 3, quoting Complainant's brief. The ALJ, however, noted that the term "issuer" is not used in Section 806 and that Congress was quite explicit in Section 806 in referring to and defining publicly traded companies. The ALJ rejected the Complainant's argument that this was a drafting mistake, the ALJ noting that other sections of the Act applied to the categories of companies narrowly defined in Section 806 and that, given that Section 806 "is different in both purpose and effect from most other provisions of the Act, there are logical reasons why Congress may have decided not to apply section 806 to prospective public companies." Finally, the ALJ found that the Complainant's argument that the limited coverage of section 806 was contrary to the policies underlying the Act did not give the ALJ the authority to redraft the law.

COVERED EMPLOYER; EXTRATERRITORIAL APPLICATION OF SOX

In *O'Mahony v. Accenture Ltd.*, 2005-SOX-72 (ALJ Jan. 20, 2006), the ALJ found persuasive the holdings of other ALJs and the First Circuit Court of Appeals that the whistleblower provision of the SOX applies only to employees who work within the United States. Thus, the ALJ dismissed the complaint where the Complainant-- an Irish national residing in France -- was an employee and partner of the French operating subsidiary of a Bermuda-based company traded on the New York Stock Exchange.

COVERED EMPLOYER; NON-PROFIT

In *Paz v. Mary's Center for Maternal & Child Care*, 2006-SOX-7 (ALJ Dec. 12, 2005), the Complainant's response to the ALJ's order to show cause why the complaint should not be dismissed on the ground that the Respondent, a non-profit, was not covered under the SOX was that he had filed his complaint under both a SOX and False Claims Act, and that OSHA mishandled his complaint by processing it only under the SOX. The ALJ found that the Respondent was not a publicly traded company and dismissed the complaint. She noted that she did not have jurisdiction over False Claims Act claims.

COVERED EMPLOYER; NON-PUBLICLY TRADED CONTRACTOR THAT PROVIDES SERVICES TO PUBLICLY TRADED COMPANIES

In *Goodman v. Decisive Analytics Corp.*, 2006-SOX-11 (ALJ Jan. 10, 2006), the Complainant was an employee of a company that provided engineering consulting services under contract with publicly traded companies. There was no allegation that the company employing the Complainant was publicly traded. The ALJ observed that different ALJs have reached different conclusions as to the jurisdictional breath of SOX, but that no definitive appellate interpretation had yet been established. The ALJ concluded that "employees of private contractors and subcontractors of publicly traded companies are not afforded SOX whistleblower protection. Any broader interpretation means every non-publicly traded company becomes subject to SOX if

it engages in any contractual relationship with a publicly traded company." Slip op. at 9-10. The ALJ found that the caption and language of the SOX employee protection provision does not extend jurisdiction that far. The ALJ concluded that the Complainant was not an employee of a publicly traded company or a company required to file with the SEC, and therefore was not an employee entitled to SOX whistleblower protection under 18 U.S.C. § 1514A(a). The ALJ, therefore, granted summary decision in favor of the Respondent.

COVERED EMPLOYER; COMPANY THAT PROVIDES SERVICES TO PUBLICLY TRADED COMPANIES

In *Smith v. Hewlett Packard*, 2005-SOX-88 to 92 (ALJ Jan. 19, 2006), the Complainant asserted that the Respondent was covered under the whistleblower provision of the SOX because it performed direct mail services as a first tier contractor to publicly traded companies. Because there was no allegation that any of the companies with which the Respondent did business directed or controlled its employment decisions, including the decision to terminate the Complainant's employment, nor that the Respondent acted on behalf of a publicly traded company when it elected to terminate the Complainant's employment, the ALJ found that the Respondent was not a covered employer under the SOX.

ARBITRATION AGREEMENTS; SEVERANCE AGREEMENTS

BINDING ARBITRATION AGREEMENT; ALJ PROCEEDING STAYED PENDING

In *Ulibarri v. Affiliated Computer Services*, 2005-SOX-46 and 47 (ALJ Jan. 13, 2006), the ALJ held that the Complainants entered into a binding agreement with the Respondent to arbitrate complaints arising out of federal law and that the Respondent had not breached that agreement. Accordingly, pursuant to the Federal Arbitration Act, 9 U.S.C. §§2, 3, the ALJ stayed the SOX whistleblower proceedings pending arbitration. See *Boss v. Salomon Smith Barney Inc.*, 263 F.Supp.2d 684, 685 (S.D.N.Y. 2003) (nothing in the text or legislative history of the SOX evinces an intent to preempt the FAA).

VALID SEVERANCE AGREEMENT AS GROUNDS BARRING SOX COMPLAINT

In *Moldauer v. Canadaigua Wine Co.*, ARB No. 04-022, ALJ No. 2003-SOX-26 (ARB Dec. 30, 2005), the ARB majority decided the case based on lack of a timely filing of a SOX complaint. One ARB member, although agreeing with the majority decision, wrote a concurring opinion to address his belief that a threshold issue in the matter was whether the Complainant's severance agreement with the Respondent had released the Respondent from liability under a SOX complaint. Reviewing applicable federal and state court decisions, and the facts surrounding the execution of the severance agreement, the concurring member concluded that "in executing a general release of all claims against [the Respondent], [the Complainant] also knowingly and voluntarily released any claim for discrimination he might have had

under the SOX." The concurring member found that such a "valid release, knowingly and voluntarily entered into for valuable consideration, and not voidable in part because of concealed facts could end the matter" independent of the timeliness issues.

BURDEN OF PROOF AND PRODUCTION

ADVERSE EMPLOYMENT ACTION

ADVERSE EMPLOYMENT ACTION; LAWSUIT TO ENJOIN COMPLAINANT FROM VIOLATING CONFIDENTIALITY AGREEMENT

In *Vodicka v. DOBI Medical International, Inc.*, 2005-SOX-111 (ALJ Dec. 23, 2005), the Complainant, who had been a member of the Respondent's board of directors, filed a SOX whistleblower complaint alleging violation of that law by the Respondent when it filed a lawsuit seeking injunctive relief in the state of New York against the Complainant on the ground that he had allegedly violated his confidentiality agreement with the Respondent. The ALJ observed that Section 806(a) of the Act prohibits retaliation against an employee in regard to the terms and conditions of employment, and that the implementing regulations at 29 C.F.R. § 1980.102 similarly provide that a company may not discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment. The ALJ concluded: "Here the lawsuit sought to enforce the confidentiality agreement by compelling Complainant to return confidential documents to Respondent and requiring him not to disseminate confidential information to other persons. Complainant has provided no explanation as to how this lawsuit could affect his ability to obtain future employment or the terms or conditions of such employment, and I can think of none." The ALJ, therefore, granted summary decision in favor of the Respondent.

An issue in the case not reached by the ALJ was whether a member of a board of directors is a covered employee under Section 806(a).

ADVERSE EMPLOYMENT ACTION; PRESENTATION OF COMPLAINANT WITH DOCUMENTS DESCRIBING "GROUND RULES" AND "HOPES AND FEARS" OF SUBORDINATES ABOUT THE COMPLAINANT'S RETURN TO WORK

In *Halloum v. Intel Corp.*, ARB No. 04-068, 2003-SOX-7 (ARB Jan. 31, 2006), the Complainant was presented with documents entitled "Ground Rules" and "Hopes and Fears" upon his return to work from a medical leave of absence. During this leave, the Complainant had filed a complaint with the SEC and management alleging fraud against shareholders, and an investigation of the allegations was instituted. The ARB agreed with the ALJ that the "Ground Rules" document was only an agenda for the meeting and not discriminatory on its face. The "Hopes and Fears" document related discussions with the Complainant's subordinates about their feelings about the Complainant's return to work. The ARB agreed with the ALJ's finding that this

document "was the result of a standard exercise [the Respondent] utilized to inform its employees that they would be protected from reprisal or intimidation after changes in management." Slip op. at 7. The ARB, therefore concluded that neither document constituted an unfavorable personnel action.

The ARB, however, also agreed with the ALJ that modifications to a Corrective Action Plan that were unreasonable and incapable of completion within the allotted time did constitute an unfavorable personnel action.

CAUSATION

CAUSATION; COMPLAINANT ONLY NEEDS TO ESTABLISH THAT PROTECTED ACTIVITY WAS A MOTIVE, NOT NECESSARILY THE PRIMARY MOTIVE

In *Halloum v. Intel Corp.*, ARB No. 04-068, 2003-SOX-7 (ARB Jan. 31, 2006), the ARB concurred with the ALJ's determination that the Respondent's decision to modify a Corrective Action Plan pertaining to the Complainant was motivated in part by the Complainant's protected activity. It was not necessary for this motive to have been the primary motivating factor in order to establish causation.

PROTECTED ACTIVITY

PROTECTED ACTIVITY; COMPLAINANT'S MISTAKEN, BUT REASONABLE BELIEF THAT THERE HAD BEEN A SECURITIES VIOLATION

In *Halloum v. Intel Corp.*, ARB No. 04-068, 2003-SOX-7 (ARB Jan. 31, 2006), the ARB affirmed the ALJ's finding that the Complainant's complaints to the SEC and management officials of the Respondent constituted protected activity under the SOX. The Complainant had alleged that he had been instructed to delay payment on invoices to increase cash on the Respondent's balance sheet to meet Wall Street expectations. The SEC and the Respondent took these allegations seriously enough to investigate, but ultimately found the contentions to be unfounded.

The ARB noted that the SOX protects the provision of information that the employee *reasonably* believes constitutes a violation of any federal law relating to fraud against shareholders. Although the Complainant was mistaken in several ways about his allegations, the ARB found that the record contained sufficient support for a finding that the Complainant reasonably believed that there was a securities violation.

PROTECTED ACTIVITY; THREAT TO FILE COMPLAINTS WITH EEOC, DOL AND OTHER AGENCIES FOR RESPONDENT'S ALLEGED SYSTEMIC RACE DISCRIMINATION IS NOT, STANDING ALONE, SUFFICIENT TO ESTABLISH FRAUD AGAINST SHAREHOLDERS

In *Smith v. Hewlett Packard*, 2005-SOX-88 to 92 (ALJ Jan. 19, 2006), the ALJ found that the Complainant did not engage in protected activity under the whistleblower provision of the SOX when he told an Employee-Relations manager that if he did not see appreciable effort by the Respondent to address longstanding and institutional discriminatory practices he would bring the issue to the attention of the EEOC, the Department of Labor and other appropriate agencies. Citing *Harvey v. The Home Depot, Inc.*, 2004-SOX-20 (ALJ May 28, 2004), the ALJ noted that protected activity under the SOX must involve an alleged violation of a federal law directly related to fraud against shareholders. There had been rumors of a class-action law suit against the Respondent. The ALJ observed that had such a suit actually been filed, and if the Respondent had prevented that information from reaching shareholders, and if the Complainant had learned of this omission and reported it, then he would have engaged in protected activity under SOX. However, in the instant case, "[m]ere knowledge that an employee-evaluation process adversely affected minorities (without knowing whether this result was intentional), coupled with an insider's access to disgruntled employees' conversations about 'external' resolutions, is not enough." Slip op. at 10. The ALJ noted that "[f]raudulent disclosures to shareholders about a company's diversity or opportunities for those within protected classes could very well impact a company's value on the public market. Socially responsible investors may move their money upon learning of a company's discriminatory practices." However, in the instant case the Complainant's allegations did not establish the making of a report related to fraud against shareholders.

PROTECTED ACTIVITY; VIOLATION OF STATE LAW NOT COVERED

In *Williams v. Sirva, Inc.*, 2006-SOX-6 (ALJ Feb. 13, 2006), the Complainant alleged that the Respondent violated the whistleblower provision of the SOX when it took adverse actions against her and constructively discharged her after she refused to participate in random telephone questioning by the California Department of Insurance about insurance fraud prevention methods. The Complainant believed that a script provided by her supervisor gave incorrect answers. The Respondent filed for summary judgment on the ground that the Complainant's decision not to participate in the telephone questioning had no relationship to federal securities law or any other federal law relating to fraud against shareholders -- rather her decision related only to possible state insurance law violations. The Complainant presented no evidence to the contrary, and the ALJ, finding that SOX does not provide protection to employees who only report violations of state statutes or laws, granted summary decision in favor of the Respondent.

CLEAR AND CONVINCING EVIDENCE STANDARD

CLEAR AND CONVINCING EVIDENCE; RESPONDENT PROVED THAT THE COMPLAINANT FAILED TO INTEGRATE INTO THE WORKFORCE AND TO PERFORM UP TO EXPECTATIONS

In *Halloum v. Intel Corp.*, ARB No. 04-068, 2003-SOX-7 (ARB Jan. 31, 2006), the ARB concurred with the ALJ's determination that the Respondent's decision to modify a Corrective Action Plan (CAP) pertaining to the Complainant was motivated in part by the Complainant's protected activity. The ARB also concurred, however, with the ALJ's determination that the Respondent had proved, by clear and convincing evidence, that it would have taken the same unfavorable personnel action against the Complainant even in the absence of his protected activity. The Respondent established that the Complainant had failed to integrate himself into the Respondent's workforce and failed to perform up to expectations. The ARB pointed to evidence in the record of the Complainant's missing of meetings, absences from work, failure to understand the Respondent's business operations, failing to meet job expectations for his grade, and failure to comprehend the Respondent's accounting system. The ARB also pointed out the decision to shift the Complainant's work to other group leaders, and concluded that these were sufficient, non-discriminatory reasons to seek the Complainant's termination as an employee.

Because of the clear and convincing evidence that the CAP would have been modified in the absence of the protected activity, the ARB declined to consider the Complainant's argument that he had been constructively discharged because the CAP established unobtainable goals.

DAMAGES AND OTHER REMEDIES

REINSTATEMENT

PRELIMINARY ORDER OF REINSTATEMENT; ALJ MUST PROVIDE CLEAR AND COHERENT NOTICE THAT THE PRELIMINARY ORDER OF REINSTATEMENT WOULD BE IN EFFECT WHILE THE ARB CONDUCTS ITS REVIEW OR UNTIL THE ARB STAYS THE ORDER

In *Welch v. Cardinal Bankshares*, ___ F.Supp.2d ___, 2006 WL 14400 (W.D.Va. Jan. 4, 2006) (case below ARB No. 04-054, ALJ No. 2003-SOX-15), the U.S. District Court for the Western District of Virginia declined to enforce an ALJ's preliminary order of reinstatement in a Sarbanes-Oxley whistleblower case on the ground that the ALJ had not followed the proper procedure for entry of such an order. The court cited an ARB decision, which possibly suggested that the ALJ should have issued a separate, preliminary order of reinstatement as is required in ERA cases. In an order denying the plaintiff's motion to alter or amend judgment, however, the district court clarified that the citation to ERA authority was only intended to support the

proposition that the ALJ must state a ruling "in clear, coherent, and unambiguous terms" and was not a ruling that the ERA procedure applied to SOX cases. **Welch v. Cardinal Bankshares**, No. 7:05CV00546, slip op. at 5 (W.D.Va. Jan. 26, 2006) (case below ARB No. 04-054, ALJ No. 2003-SOX-15). Thus, the deficiency was not the lack of a reinstatement order separate from the ALJ's decision and order, but the lack of effective notice to the Respondent that the preliminary order of reinstatement would be in effect while the ARB conducted its review or until the ARB stayed the order.

DISMISSALS/WITHDRAWAL

DISMISSAL FOR CAUSE; CONTUMACIOUS CONDUCT IN DISCOVERY

In **McDaniel v. Sysco Corp.**, 2005-SOX-26 (ALJ Dec. 15, 2005), the ALJ granted dismissal as a sanction where the record established that the Complainant "deliberately engaged in conduct calculated to defeat [the Respondent's] right to depose him, and to make the discovery process as costly and as frustrating to [the Respondent] as possible." In dismissing the complaint, the ALJ analyzed the factors stated by the ARB in **Howick v. Campbell-Ewald Co.**, 2004-STA-7 (ARB Nov. 20, 2004).

DISMISSAL FOR CAUSE; FAILURE TO PROSECUTE AND FAILURE TO COMPLY WITH THE LAWFUL ORDERS OF THE ALJ

In **Townsend v. Big Dog Holdings**, 2006-SOX-28 (ALJ Feb. 14, 2006), despite repeated warnings that her failure to do so would result in sanctions, including the dismissal of her case, the Complainant failed to respond to the ALJ's prehearing orders. Accordingly, the ALJ dismissed the complaint for lack of prosecution and failure to comply with the lawful orders of an administrative law judge. See 29 C.F.R. §§ 18.6(d)(2)(v) and 24.6(e)(4); **Link v. Wabash Railroad Co.**, 370 U.S. 626 (1962) (inherent authority of judge to manage docket). The ALJ also found that, because of her failure to participate, the Complainant failed to establish a prima facie case. Moreover, the Complainant failed to prove that she engaged in protected activity and failed to prove that the Respondent's articulated legitimate, non-discriminatory grounds for her dismissal were pretextual.

SURFACE TRANSPORTATION ASSISTANCE ACT

[STAA Whistleblower Digest II B 1]

REQUEST FOR ALJ HEARING; FAILURE TO SERVE OPPOSING PARTY

In *Thissen v. Tri-Boro Construction Supplies, Inc.*, ARB No. 04-153, ALJ No. 2004-STA-35 (ARB Dec. 16, 2005), the Complainant failed to mail a copy of his objections to the OSHA determination and request for ALJ hearing to the Respondent as required by the STAA regulations. The ARB affirmed the ALJ's ruling that this failure did not defeat the Complainant's right to a hearing because the Respondent had not been unduly prejudiced by the short delay between the filing deadline and when it actually received a copy of the objections/hearing request.

[STAA Whistleblower Digest II B 2]

TIMELINESS OF COMPLAINT

In *Thissen v. Tri-Boro Construction Supplies, Inc.*, ARB No. 04-153, ALJ No. 2004-STA-35 (ARB Dec. 16, 2005), the Complainant filed a STAA complaint alleging that the Respondent violated the STAA because it had failed to comply with the terms of a settlement agreement. The ARB found that the ALJ properly granted the Respondent's motion for summary decision where the Complainant unquestionably filed his complaint more than 180 days after learning that the Respondent was not complying with the settlement agreement and the circumstances did not warrant tolling of the statute of limitations.

[STAA Whistleblower Digest II B 2 d i]

JURISDICTION; NOT DEPENDENT ON TIMELINESS OF COMPLAINT

In *Thissen v. Tri-Boro Construction Supplies, Inc.*, ARB No. 04-153, ALJ No. 2004-STA-35, slip op. at n.23 (ARB Dec. 16, 2005), the ALJ properly dismissed the complaint as not timely filed; the ALJ, however, wrongly stated that such a finding meant she had no "jurisdiction" to make a determination on the merits of the complaint. The STAA limitations period is not jurisdictional.

[STAA Whistleblower Digest II B 2 d ii]

TIMELINESS OF REQUEST FOR ALJ HEARING; EQUITABLE TOLLING

In *Thissen v. Tri-Boro Construction Supplies, Inc.*, ARB No. 04-153, ALJ No. 2004-STA-35 (ARB Dec. 16, 2005), the Complainant's request for an ALJ hearing was not received by OALJ within 30 days after the OSHA finding because the mailing envelope had been misaddressed (1800 K St. instead of 800 K St.). The ALJ applied equitable tolling to find that the request for a hearing was timely filed because of proof that the request had been timely mailed but to the wrong address, and because of proof that the Complainant was diligent in following up once he became aware that OALJ had not received his objection. The ARB found that substantial

evidence supported these findings and that, as a matter of law, the appeal was properly before the ALJ.

[STAA Whistleblower Digest II B 2 d ii]

TIMELINESS OF COMPLAINT; FILING A COMPLAINT WITH ANOTHER AGENCY IS NOT A CIRCUMSTANCE JUSTIFYING EQUITABLE TOLLING

Although the grounds for equitable tolling found in *School Dist. of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981), are consistent with the STAA regulation at 29 C.F.R. § 1978.102(d)(3), filing a complaint "with another agency" is not a circumstance justifying equitable tolling. ***Thissen v. Tri-Boro Construction Supplies, Inc.***, ARB No. 04-153, ALJ No. 2004-STA-35, slip op. at n.21 (ARB Dec. 16, 2005).

[Editor's note: See ***Hillis v. Knochel Brothers, Inc.***, ARB Nos. 03-136, 04-081, 04-148, ALJ No. 2002-STA-50, slip op. at 2-3 (ARB Dec. 12, 2005), an Order Requesting briefing by OSHA, Complainant and Intervenor on the issue of whether *Allentown* does not apply to wrong forum grounds for equitable tolling in STAA cases).]

[STAA Whistleblower Digest II B 2 d ii]

TIMELINESS OF COMPLAINT; EQUITABLE TOLLING; ARB TO RECONSIDER ITS FINDING THAT THE "WRONG FORUM" EXCEPTION DOES NOT APPLY UNDER THE STAA REGULATIONS

In *Hillis v. Knochel Brothers, Inc.*, ARB Nos. 03-136, 04-081, 04-148, ALJ No. 2002-STA-50 (ARB Oct. 19, 2004), the ARB dismissed the complaint as untimely filed. In considering whether equitable tolling applied, the Board held that "[A]lthough this Board has been guided by *Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981)], the STAA regulations [at 29 C.F.R. § 1978.103(d)(3)] cite filing with another agency as a circumstance not justifying equitable tolling. . . . Thus, to the extent that a STAA complainant requests equitable tolling because he filed in the wrong forum, *Allentown* is inapplicable. The ALJ erred by relying on *Allentown* to proceed to a hearing on the merits of Hillis's complaint." Slip op. at 3 (citations omitted). The Complainant appealed to the Ninth Circuit, *Hillis v. U.S. Dept. of Labor*, No. 05-70041; the ARB, however, filed an unopposed motion for remand to reconsider its interpretation of section 1978.102(d)(3) "in light of that provision's regulatory history." ***Hillis v. Knochel Brothers, Inc.***, ARB Nos. 03-136, 04-081, 04-148, ALJ No. 2002-STA-50, slip op. at 2-3 (ARB Dec. 12, 2005) (Order Requesting briefing by OSHA, Complainant and Intervenor).

[STAA Whistleblower Digest II E 2]

AUTHORITY OF ARB; ALJ DOES NOT NEED ARB'S PERMISSION TO RULE ON A MOTION; NOR DOES THE ARB HAVE THE AUTHORITY TO ORDER THE ALJ TO RULE A CERTAIN WAY PRIOR ISSUANCE OF A DECISION AND ORDER

In *Somerson v. Eagle Express Lines, Inc.*, ARB No. 06-001, ALJ No. 2004-STA-12 (ARB Dec. 13, 2005), the Complainant filed a document with the ARB requesting that it permit the ALJ to rule on two previous summary judgment motions filed by the Complainant's former attorney and to forbid the ALJ from disposing of the case on the Complainant's alleged inability to participate in the matter. The ARB found that it had no authority to grant the relief requested. The Board indicated that the ALJ did not need its permission to rule on the summary judgment motions and stated that it has no authority to order the ALJ how to rule in a case before the ALJ has issued his decision and order.

[Editor's note: The Complainant's motion was evidently grounded in the fact that his attorney had been disqualified from appearing before OALJ].

[STAA Whistleblower Digest II H 1]

[STAA Whistleblower Digest VI C]

MOOTNESS; WARNING LETTER THAT NO LONGER HAD ANY DISCIPLINARY EFFECT UNDER THE APPLICABLE COLLECTIVE BARGAINING AGREEMENT

In *Agee v. ABF Freight Systems, Inc.*, ARB No. 04-182, ALJ No. 2004-STA-40 (ARB Dec. 29, 2005), the Board dismissed the complaint finding that it could not redress the Complainant's alleged injury from a warning notice for excessive absenteeism that no longer had any disciplinary or other effect under the applicable collective bargaining agreement. The Complainant had alleged that the warning notice violated a federal motor carrier safety regulation that prohibits motor carriers from requiring truck drivers to drive while likely to be impaired through fatigue or illness. The Board found that the Complainant had not shown that a § 31105 complaint based on a written notice issued pursuant to the local bargaining agreement in effect in 2003 necessarily evades review or that it is reasonably likely that the Respondent will issue such a notice to him in the future. Moreover, the Board held that neither the Complainant's attorney fees nor his request for injunctive relief preserved the case from mootness.

[STAA Whistleblower Digest II H 4]

ARB'S STANDARD OF REVIEW; ALJ'S IMPOSITION OF SANCTIONS UNDER RULE 18.6(d)(2)

The ARB applies an abuse discretion standard when reviewing an ALJ's imposition of sanctions under 29 C.F.R. § 18.6(d)(2). Rule 18.6(d)(2) provides that if a party fails to comply with discovery or other orders of the ALJ, the ALJ may impose sanctions such as drawing adverse inferences and deeming factual matters to be admitted.

Waechter v. J.W. Roach & Sons Logging & Hauling, ARB No. 04-183, ALJ No. 2004-STA-43 (ARB Jan. 9, 2006).

[STAA Whistleblower Digest II H 4]

ARB STANDARD OF REVIEW; ALJ'S DISCOVERY SANCTION REVIEWED UNDER ABUSE OF DISCRETION STANDARD

An ALJ's imposition of discovery sanctions is reviewed by the ARB under an abuse of discretion standard in an STAA whistleblower appeal. **Cefalu v. Roadway Express, Inc.**, ARB Nos. 04-103, 04-161, ALJ No. 2003-STA-55 (ARB Jan. 31, 2006).

[STAA Whistleblower Digest IV A 2 d]

CAUSATION; RESPONDENT'S AWARENESS OF PROTECTED COMPLAINT; COMPLAINANT DID NOT RAISE HOURS OF SERVICE ALLEGATION UNTIL AFTER DISCHARGE

[STAA Whistleblower Digest II H 4 c]

ARB SCOPE OF REVIEW; ARGUMENTS NOT RAISED BEFORE THE ALJ

Where the Complainant admitted that he did not provide any reason for declining a dispatch prior to his discharge, he failed to demonstrate that he made the Respondent aware of a protected complaint, and his STAA whistleblower complaint therefore failed as a matter of law. On appeal the Complainant argued that even if he did not make a protected complaint to the Respondent on the day of his termination, he had made hours of service and similar complaints in the past, and the ALJ should not have granted summary decision because that protected activity could have factored into the Respondent's decision to discharge him. The ARB declined to address this argument because it had not been raised below. **Harris v. Allstates Freight Systems**, ARB No. 05-146, ALJ No. 2004-STA-17 (ARB Dec. 29, 2005).

[STAA Whistleblower Digest II I]

RECONSIDERATION BY THE ARB

Where the Complainant's motion for reconsideration presented new evidence that did not alter the record or the ALJ's determination in regard to the Complainant's failure to establish that he had engaged in protected activity, and the motion raised the same arguments that were considered and rejected by the ARB in its original decision affirming the ALJ, the Board declined to reconsider. **Cummings v. USA Truck, Inc.**, ARB No. 04-043, ALJ No. 2003-STA-47 (ARB Dec. 12, 2005).

[STAA Whistleblower Digest II K]

SANCTIONS UNDER RULE 18.6(d)(2); RESPONDENT'S FAILURE TO RESPOND TO ALJ'S ORDERS OR COMPLAINANT'S INTERROGATORIES, REQUESTS FOR ADMISSION OR MOTION FOR SUMMARY JUDGMENT

In *Waechter v. J.W. Roach & Sons Logging & Hauling*, ARB No. 04-183, ALJ No. 2004-STA-43 (ARB Jan. 9, 2006), the ALJ issued several orders to the parties, none of which the Respondent answered. The Respondent also ignored the Complainant's interrogatories, requests for admissions, and Motion for Partial Summary Judgment. Accordingly, the ALJ ordered the Respondent to show cause why sanctions authorized by 29 C.F.R. § 18.6(d)(2) should not be imposed. When the Respondent again failed to reply, the ALJ ordered that the factual matters addressed by the Complainant's request for admissions be deemed admitted and that the factual matters asserted in the Complainant's affidavit in support of his Motion for Partial Summary Judgment be deemed unopposed. The ALJ also ruled that the Complainant would be afforded an opportunity to present argument and evidence in support of damages and attorney fees and costs and that the Respondent would not be permitted to oppose these submissions. The Respondent made no response to this order either. On review, the ARB held that the record fully supported the ALJ's exercise of discretion in applying sanctions authorized by Rule 18.6(d)(2).

[STAA Whistleblower Digest II K]

SANCTIONS FOR FAILURE TO COMPLY WITH DISCOVERY ORDER; RESPONDENT'S REFUSAL TO REVEAL IDENTITY OF CONFIDENTIAL INFORMANT

In *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, 04-161, ALJ No. 2003-STA-55 (ARB Jan. 31, 2006), the Complainant was discharged the very evening that he provided a statement on behalf of a co-worker who had grieved a discharge for allegedly falsifying his driving log. The Complainant's statement alleged that a superior had asked him to falsify a log in violation of the hours of service regulations. The stated ground for the discharge was that the Complainant lied on his 1999 job application.

In discovery the Complainant served an interrogatory requesting the identity of all persons who provided information that the Respondent considered in determining whether to discharge the Complainant. The Respondent refused to respond on the ground that it had promised to keep the informant's identity secret. The ALJ granted the Complainant's motion to compel and denied a motion by the Respondent for a protective order. The Respondent refused to comply. Later, the Complainant's counsel deposed three witnesses of the Respondent who knew the identity of the informant but refused to disclose it. The Complainant thereafter filed a motion seeking sanctions. The ALJ denied a default judgment, but ordered that the Respondent not be permitted to present any evidence that arose from the unidentified confidential source. After a hearing, the ALJ found in favor of the Complainant.

On review, the ARB found that the ALJ's discovery sanction was not an abuse of discretion. The Respondent's defense was to be that its discharge of the Complainant for lying on his job application was a legitimate, non-discriminatory ground. To show that this was pretext, the Complainant was entitled to know when the Respondent found out about the job application and from whom. He was also entitled to know who participated in the decision to discharge him. The Board, therefore, found that the discovery sanction was appropriate and tailored to the discovery the Respondent refused to produce.

[STAA Whistleblower Digest IV C 2 b]

LEGITIMATE NON-DISCRIMINATORY REASON FOR DISCHARGE; ARGUMENT WITH FOREMAN

In *Jenkins v. Old Dominion Recycling, Inc.*, ARB No. 05-013, ALJ No. 2004-STA-13 (ARB Jan. 27, 2006), the ARB found that substantial evidence supported the ALJ's dismissal of the complaint on the ground that the Complainant did not prove that the ground stated by the Respondent for his discharge -- an extended argument with his foreman -- was a mere pretext for retaliation for activity protected under the STAA.

[STAA Whistleblower Digest V B 1 c v]

PROTECTED ACTIVITY; STATEMENT PROVIDED IN CO-WORKER'S GRIEVANCE HEARING

In *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, 04-161, ALJ No. 2003-STA-55 (ARB Jan. 31, 2006), the Complainant provided a statement on behalf of a co-worker who had grieved a discharge for allegedly falsifying his driving log. The Complainant's statement alleged that a superior had asked him to falsify a log in violation of the hours of service regulations. The ARB found that the ALJ correctly found that such testimony related to motor vehicle safety and was therefore protected activity under the STAA.

[STAA Whistleblower Digest V B 2 a iv]

PROTECTED ACTIVITY; FATIGUE BREAKS DURING RUN ARE NOT PROTECTED ACTIVITY WHERE THE COMPLAINANT REPEATEDLY SHOWS UP FOR WORK INADEQUATELY RESTED

In *Blackann v. Roadway Express, Inc.*, No. 04-4026 (6th Cir. Dec. 15, 2005) (unpublished) (available at 2005 WL 3448280) (case below ARB No. 02-115, ALJ No. 2000-STA-38), the Sixth Circuit affirmed the ARB's holding that the Respondent discharged the Complainant due to his repeated reporting for duty when he was simply too tired to perform that duty, and not because of taking STAA-protected fatigue breaks. The court stated that "the purposes of the STAA would not be well served by permitting an employee to chronically report for duty aware of the strong probability that he would not be able to finish a driving shift in a timely fashion, and then claim STAA protection when his employer takes adverse action." Slip op. at 6.

[Editor's note: The Sixth Circuit's decision is unclear as to the precise basis on which the ARB is being affirmed -- that the fatigue breaks were not protected activity -- or that the Complainant failed to establish a causal link between protected activity and his discharge -- or, as a concurring member of the Sixth Circuit panel found, because the Employer articulated a legitimate non-discriminatory reason for the discharge which the Complainant failed to show was pretext.]

[STAA Whistleblower Digest V B 1 c i]

PROTECTED ACTIVITY; COMPLAINANT'S FAILURE TO COMPLY WITH EMPLOYER'S POLICY REQUIRING LOGGING TIME SLEEPING AS "OFF DUTY" IS NOT PROTECTED ACTIVITY

In *Blackann v. Roadway Express, Inc.*, No. 04-4026 (6th Cir. Dec. 15, 2005) (unpublished) (available at 2005 WL 3448280) (case below ARB No. 02-115, ALJ No. 2000-STA-38), the Sixth Circuit affirmed the ARB's holding that the Complainant failure to comply with the Respondent's policy of requiring that drivers record time sleeping as "off duty" even when the truck does not have a sleeper berth was not protected activity under the STAA. Although the Complainant cited that the DOT regulation defining on duty time at 49 C.F.R. § 395.2(4), the ARB had correctly found that this regulation explicitly left it to employers to determine the manner of recording tour of duty time.

[STAA Whistleblower Digest VI A]

ADVERSE ACTION; TANGIBLE JOB CONSEQUENCE AS ELEMENT OF PRIMA FACIE CASE

A written warning is not an adverse employment action within the meaning of STAA absent evidence of a tangible job consequence. See *West v. Kasbar, Inc.*, ARB No. 04-155, ALJ No. 2004-STA-34, slip op. at 4 (ARB Nov. 30, 2005) (and cases discussed therein). Thus the ARB in *Agee v. ABF Freight Systems, Inc.*, ARB No. 04-182, ALJ No. 2004-STA-40 (ARB Dec. 29, 2005), observed that because the Complainant had challenged only the issuance of a warning letter and made no claim that the warning resulted in a tangible job consequence, the complaint did not allege a prima facie case of unlawful retaliation and could have been dismissed without a hearing on that ground alone. In the instant case, however, the issue on appeal was whether the case was moot because the warning letter no longer had any disciplinary or other effect under the applicable collective bargaining agreement.